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Nos. 07-984 & 07-990

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

COEUR ALASKA, INC.,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

STATE OF ALASKA,

Petitioner,

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER STATE OF ALASKA

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QUESTION PRESENTED

Whether the Ninth Circuit erred in invalidating the longstanding regulatory interpretation of the U.S. Army Corps of Engineers (the "Corps") and the Environmental Protection Agency ("EPA") that discharges of dredged or fill material are subject to the exclusive permitting authority of the Corps under Section 404 of the Clean Water Act, rather than effluent limitations and standards of performance promulgated under Sections 301 and 306 and applied by EPA pursuant to its separate permitting authority under Section 402.

PARTIES TO THE PROCEEDINGS

Petitioner in No. 07-990 is the State of Alaska. The State was a defendant-intervenor and appellee below.

Petitioner in No. 07-984 is Coeur Alaska, Inc. Coeur Alaska, Inc. was a defendant-intervenor and appellee below.

The Federal government respondents in this Court are the United States Army Corps of Engineers; Kevin J. Wilson, in his official capacity as District Engineer; Michael Rabbe, in his official capacity as Chief of the Regulatory Branch; George S. Dunlop, in his official capacity as Principal Deputy Assistant Secretary of the Army (Civil Works); and the United States Forest Service. These respondents, or their predecessors in their official capacities, were defendant-appellees below. Mr. Wilson succeeded Colonel Timothy J. Gallagher as District Engineer. Mr. Rabbe succeeded Larry L. Reeder as Chief of the Regulatory Branch. Mr. Dunlop succeeded Dominic Izzo as Principal Deputy Assistant Secretary.

Goldbelt, Inc. is also a respondent in this Court. Goldbelt, Inc. was a defendant-intervenor and appellee below.

Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation are also respondents in this Court. These respondents were plaintiff-appellants below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	4
A. The Statutory Scheme	4
B. The Agencies' Interpretation	8
1. The Agencies Have Always Agreed That The Corps Has Exclusive Authority Over Fill Material	8
2. The 2002 Fill Rule	9
C. The Kensington Project	12
1. Tailings Disposal Options	12
2. The Permits	16
D. The Decisions Below	18
SUMMARY OF THE ARGUMENT	20
ARGUMENT	23

TABLE OF CONTENTS—Continued

I. THE CWA IS UNAMBIGUOUS THAT THE CORPS HAS EXCLUSIVE AUTHORITY UNDER SECTION 404 TO PERMIT DISCHARGES OF FILL MATERIAL, SUBJECT TO EPA'S VETO RIGHT 24

A. Sections 402 And 404 Are Separate Permitting Programs Governed By Different Regulations 24

B. The Provisions Relied On By The Ninth Circuit Do Not Provide Otherwise 30

C. The History Of The CWA Confirms The Corps' Exclusive Permitting Role. 35

1. The Corps' Pre-Existing Authority To Permit Discharges Of Mine Tailings 36

2. The CWA Compromise 38

II. THE AGENCIES REASONABLY RESOLVED ANY AMBIGUITY. 41

III. THE AGENCIES' INTERPRETATION OF THEIR OWN REGULATIONS IS NOT PLAINLY ERRONEOUS. 49

CONCLUSION 55

TABLE OF AUTHORITIES

Page

CASES:

Auer v. *Robbins*, 519 U.S. 452 (1997) 50

Barnhart v. *Walton*, 535 U.S. 212 (2002) 42

Bates v. *United States*, 522 U.S. 23 (1997) 27

Chemical Mfrs. Ass'n v. *NRDC*, 470 U.S. 116 (1985) 42

Chevron U.S.A. Inc. v. *Echazabal*, 536 U.S. 73 (2002) 44

Chevron U.S.A., Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) 23, 24, 35

E. I. Du Pont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977) 35

Federal Express Corp. v. *Holowecki*, 128 S. Ct. 1147 (2008) 50

Kentuckians for the Commonwealth, Inc. v. *Rivenburgh*, 317 F.3d 425 (4th Cir. 2003) 42

National Ass'n of Home Builders v. *Defenders of Wildlife*, 127 S. Ct. 2518 (2007) 43, 44, 50, 54

Rapanos v. *United States*, 547 U.S. 715 (2006) 22, 25, 46, 48

Reserve Mining Co. v. *EPA*, 514 F.2d 492 (8th Cir. 1975) 37, 38

Russello v. *United States*, 464 U.S. 16 (1983) 27

TABLE OF AUTHORITIES—Continued

	Page
S.D. Warren Co. v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370 (2006)	27
Solid Waste Agency of N. Cook County v. *U.S. Army Corps of Engineers*, 531 U.S. 159 (2001)	49
Thomas Jefferson Univ. v. *Shalala*, 512 U.S. 504 (1994)	50
United States v. *Fisk*, 70 U.S. 445 (1866)	30
United States v. *Granderson*, 511 U.S. 39 (1994)	27
United States v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655 (1973)	37
United States v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985)	49
United States v. *Standard Oil Co.*, 384 U.S. 224 (1966)	37, 47
Willamette Iron Bridge Co. v. *Hatch*, 125 U.S. 1 (1888)	37
STATUTES:	
18 U.S.C. § 1963(a)(1)	28
28 U.S.C. § 1254(1)	2
33 U.S.C. § 401 *et seq*	37
33 U.S.C. § 407a	36
Federal Water Pollution Control Act Amendments of 1972 ("Clean Water Act"), Pub. L. No. 92-500, 86 Stat. 816, as amended:	
§ 101(a), 33 U. S. C. § 1251(a)	4, 5

TABLE OF AUTHORITIES—Continued

	Page
§ 301, 33 U.S.C. § 1311	1, 6
§ 301(a), 33 U.S.C. § 1311(a)	*passim*
§ 301(e), 33 U.S.C. § 1311(e)	32
§ 301(g)(4), 33 U.S.C. § 1311(g)(4)	33
§ 301(j)(1), 33 U.S.C. § 1311(j)(1)	26
§ 306, 33 U.S.C. § 1316	2, 6
§ 306(e), 33 U.S.C. § 1316(e)	33
§ 307, 33 U.S.C. § 1317	5
§ 307(a)(5), 33 U.S.C. § 1317(a)(5)	21, 29
§ 309, 33 U.S.C. §§ 1319	32
§ 310(c), 33 U.S.C. § 1320(c)	33
§ 312(f)(1), 33 U.S.C. § 1322(f)(1)	26
§ 312(g)(2), 33 U.S.C. § 1322(g)(2)	33
§ 315, 33 U.S.C. § 1325	33
§ 318, 33 U.S.C. § 1328	*passim*
§ 318(b), 33 U.S.C. § 1328(b)	28
§ 401, 33 U.S.C. § 1341	7
§ 401(a), 33 U.S.C. § 1341(a)	3
§ 402, 33 U.S.C. § 1342	*passim*
§ 402(a), 33 U.S.C. § 1342(a)	*passim*
§ 402(a)(1), 33 U.S.C. § 1342(a)(1)	27
§ 403(c), 33 U.S.C. § 1343(c)	48
§ 403(c)(1), 33 U.S.C. § 1343(c)(1)	45
§ 404, 33 U.S.C. § 1344	*passim*
§ 404(a), 33 U.S.C. § 1344(a)	4
§ 404(b)(1), 33 U.S.C. § 1344(b)(1)	*passim*

TABLE OF AUTHORITIES—Continued

	Page
§ 404(c), 33 U.S.C. § 1344(c)	6
§ 404(f), 33 U.S.C. § 1344(f)	4, 26
§ 404(g)-(k), 33 U.S.C. § 1344(g)-(k)	7
§ 404(p), 33 U.S.C. § 1344(p)	*passim*
§ 502(11), 33 U.S.C. § 1362(11)	6
§ 505, 33 U.S.C. § 1365	26
Clean Water Act Amendments of 1977, Pub. L. No. 95-217, § 63, 91 Stat. 1599 (1977)	28
Rivers and Harbors Appropriations Act of 1886, 24 Stat. 329 (1886)	36
Water Quality Act of 1987, Pub. L. No. 100-4, § 313(d) (1987)	28
Water Resources Development Act of 1986, Pub. L. 99-662, tit. XI, § 1106 (1986)	37
CONGRESSIONAL MATERIALS:	
17 Cong. Rec. 6827-29 (1886)	36
117 Cong. Rec. 38854 (1971)	38
117 Cong. Rec. 38883 (1971)	38
118 Cong. Rec. 10632 (1972)	39
118 Cong. Rec. 33699 (1972)	40
H.R. Rep. No. 92-911 (1972)	39
S. Rep. No. 92-414 (1971)	38

TABLE OF AUTHORITIES—Continued

Page

REGULATIONS:

33 C.F.R. § 323.2(e) ..... *passim*
33 C.F.R. § 323.2(e) (2002) 9
40 C.F.R. § 122.3(b) ..... *passim*
40 C.F.R. § 230.1(a) 5
40 C.F.R. § 230.5(c) ..... *passim*
40 C.F.R. § 230.10(c)(2), (3) ..... *passim*
40 C.F.R. § 232.2 11
40 C.F.R. §§ 233.270-233.271 7
40 C.F.R. Part 440 ..... *passim*
40 C.F.R. § 440.104(b)(1) ..... *passim*

ADMINISTRATIVE MATERIALS:

38 Fed. Reg. 13,528 (1973) 8, 41
40 Fed. Reg. 19,766 (1975) 10
40 Fed. Reg. 31,320 (1975) 10
40 Fed. Reg. 41,292 (1975) 10
42 Fed. Reg. 37,122 (1977) 10
44 Fed. Reg. 54,222 (1979) 29
51 Fed. Reg. 8,871 (1986) 9
53 Fed. Reg. 20,764 (1988) 10
65 Fed. Reg. 21,292 (2000) ..... *passim*
67 Fed. Reg. 31,129 (2002) ..... *passim*

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OPINIONS BELOW

The opinion of the Ninth Circuit is available at 486 F.3d 638 and is reproduced at JA517a. The unpublished order of the District Court is reproduced at JA478a.

JURISDICTION

The judgment of the Ninth Circuit was entered on May 22, 2007. JA517a. That court denied timely

filed petitions for rehearing and rehearing en banc on October 29, 2007. JA553a. This Court granted timely petitions for a writ of certiorari on June 27, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The text of relevant statutes and regulations is set forth in the appendix to this brief.

INTRODUCTION

This case involves a fundamental aspect of the Clean Water Act ("CWA"): its division of permitting responsibilities between the U.S. Army Corps of Engineers (the "Corps") and the Environmental Protection Agency ("EPA"). Under Section 404 of the CWA, 33 U.S.C. § 1344, the Corps has the exclusive responsibility for permitting all discharges of "dredged or fill material" into the waters of the United States, pursuant to regulations developed specifically for the Section 404 program and subject to an EPA veto right if the discharge would have an unacceptable adverse effect on the environment. Under Section 402, 33 U.S.C. § 1342, EPA has the responsibility for permitting discharges of other pollutants pursuant to different regulations. Congress expressly provided that EPA's authority under Section 402 applies only "[e]xcept as provided in * * * [Section 404]," *id.*, thereby confirming the Corps' exclusive role to permit all discharges of dredged or fill material, even where that material might otherwise be subject to EPA's Section 402 authority.

In this case, the Ninth Circuit disregarded this careful statutory delineation of responsibilities, holding that the Corps may not issue—on any terms—a permit for the discharge of what is indisputably "fill material" within the meaning of

Section 404. It therefore invalidated a Corps permit for the discharge as fill material of mine "tailings"—ground up rock and earth that is left over after ore is extracted—even though the Corps had concluded after lengthy and exhaustive review that this was the most environmentally advantageous method of disposing of the tailings.

The Ninth Circuit's decision was wrong. It held that the fill material at issue is subject to the exclusive permitting jurisdiction of EPA, but the CWA confirms the opposite: that this authority is the exclusive responsibility of the Corps, subject to a potential EPA veto that was not exercised here. Indeed, the history of the CWA confirms that Congress intended to continue the Corps' longstanding authority to regulate all fill material, which for more than 120 years has been exercised to regulate discharges of mine tailings. And even if the statute were ambiguous, the agencies' consistent and longstanding division of regulatory responsibilities is reasonable, and therefore entitled to dispositive deference, given the language of the statute and the recognized differences between fill material and other, more mobile, discharges. Finally, there is no credence to the Ninth Circuit's determination that the agencies plainly erred in interpreting their own regulations as vesting the Corps with exclusive permitting authority over fill material. In fact, the regulations expressly recognize that EPA has never subjected fill material to its own separate regulations.

The State of Alaska, which has an independent duty to ensure that permits comply with the CWA, *see* 33 U.S.C. § 1341(a), has determined that the permit at issue is both valid and the most environ-

mentally protective option. The Court should uphold that permit and reverse the decision below.

STATEMENT OF THE CASE

A. The Statutory Scheme.

The purpose of the Federal Water Pollution Control Act Amendments of 1972, popularly known as the Clean Water Act, is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U. S. C. § 1251(a). The CWA allows the discharge of material into waters of the United States pursuant to a permit issued either by the Corps under Section 404, 33 U.S.C. § 1344, or by EPA under Section 402, 33 U.S.C. § 1342.[1]

Section 404 provides, in pertinent part, that the Corps "may issue permits * * * for the discharge of dredged or fill material into the navigable waters" under guidelines (known as the "Section 404(b)(1) Guidelines") developed jointly by EPA and the Corps. 33 U.S.C. § 1344(a), (b)(1). By contrast, Section 402 provides, in pertinent part, that

> *[e]xcept as provided in section[] * * * 1344 of this title* [Section 404 of the CWA], the Administrator [of EPA] may * * * issue a permit for the discharge of any pollutant, or combination of pollutants * * * upon condition that such discharge will meet * * * all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title.

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[1] The only exceptions to the permit requirement are for certain farming practices, not at issue here, which require no permits under either Section 404 or Section 402. *See* 33 U.S.C. § 1344(f). EPA also may issue permits for aquaculture projects under Section 318, but that section, as amended, now incorporates all the requirements of Section 402. *See* 33 U.S.C. § 1328.

33 U.S.C. § 1342(a) (emphasis added). The Section 402 program is also known as the National Pollutant Discharge Elimination System ("NPDES").

The two programs are thus mutually exclusive. Under Section 404, the Corps may issue permits for the discharge of "dredged or fill material," whereas under Section 402 EPA may issue permits for the discharge of other pollutants "[e]xcept as provided in [Section 404]." As the agencies have explained, these "two regulatory programs were established by the CWA serving distinct objectives and goals." JA47a. The Section 402 program "limits discharges of pollutants in order to protect water quality of the receiving water." *Id.* By contrast, the Section 404 program "regulates dredged and fill activities that, among other things, may displace or change the elevation of receiving water." *Id.*

Section 404 permitting is a rigorous process. The Section 404(b)(1) Guidelines are developed by EPA in conjunction with the Corps specifically for the Section 404 program. 33 U.S.C. § 1344(b)(1). The goal of the Guidelines is exactly the same as that of the CWA itself: "to restore and maintain the chemical, physical, and biological integrity of waters of the United States." 40 C.F.R. § 230.1(a). *Accord* 33 U.S.C. § 1251(a). Under the Guidelines, "discharges having significant adverse effects on aquatic ecosystems are not allowable." 65 Fed. Reg. 21,293 (2000) (citing 40 C.F.R. § 230.10(c)(2), (3)). The Guidelines require "careful consideration of the effects of the discharge on the aquatic ecosystem as a whole, as well as evaluation of alternatives to the discharge and measures to minimize and compensate for unavoidable adverse effects." 65 Fed. Reg. 21,293 (2000). The Guidelines require use of the least

environmentally damaging practicable alternative. 40 C.F.R. § 230.5(c).

While the ultimate authority to issue dredge or fill permits lies with the Corps, Congress was careful to mandate EPA oversight as well. Under Section 404(c), EPA may veto any Section 404 permit if it determines that the discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas * * *, wildlife, or recreational areas." 33 U.S.C. § 1344(c).

EPA's separate Section 402 permitting authority is subject to different requirements. Unlike Section 404, which contains no such restrictions, Section 402 provides that an EPA permit must "meet * * * all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title." 33 U.S.C. § 1342(a). Most notably among that list, EPA permits must comply with applicable EPA-established "effluent limitations" under Section 301 of the CWA for existing sources, 33 U.S.C. § 1311, and "performance standards" under Section 306 for new sources, 33 U.S.C. § 1316. The substance of these two categories of standards is generally congruent, and this brief will refer to them collectively as "effluent limitations." *See* JA529a n.8 ("A standard of performance is one type of effluent limitation.") (citing 33 U.S.C. § 1362(11)). Unlike EPA's regulations for Section 402 permits, the Section 404(b)(1) Guidelines do not mandate compliance with effluent limitations promulgated under Sections 301(e) or 306(e).[2]

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[2] The Guidelines do, however, require compliance with toxic effluent limitations, which are promulgated by EPA under Section 307 of the CWA, and which Congress expressly

Under Section 401 of the CWA, both EPA and the Corps are further restricted by the States' authority. 33 U.S.C. § 1341. To receive a permit under either Sections 402 or 404, an applicant must obtain a "certification from the State in which the discharge originates * * * that any such discharge will comply with" applicable federal and state water quality laws. 33 U.S.C. § 1341. Under Section 401, states such as Alaska therefore have an independent interest in ensuring the proper application of the CWA, since they must independently certify, *inter alia*, that any applicable provisions of Sections 301 and 306 have been complied with. *See id.* In addition, certain states have received approval to administer their own Section 404 programs. *See* 33 U.S.C. § 1344(g)-(k); 40 C.F.R. §§ 233.270-233.271.

Tying the scheme together, Section 301(a) contains a general compliance requirement stating that "[e]xcept as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). And reinforcing the conclusive nature of a Section 404 permit, Section 404(p) provides that "compliance with a permit issued under [Section 404] constitutes compliance with * * * [Section 301]" for enforcement purposes. 33 U.S.C. § 1344(p).

These provisions create a consistent, comprehensive set of requirements for dredged or fill material: (1) the Corps may permit a discharge of such material provided the discharge complies with the Section 404(b)(1) Guidelines and is not vetoed by

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authorized EPA to apply to some Section 404 discharges. *See infra* at 29.

EPA; (2) such discharges are not subject to EPA's Section 402 authority, which applies only "[e]xcept as provided in * * * [Section 404]"; and (3) compliance with a Section 404 permit constitutes compliance with the overarching requirement of Section 301(a).

B. The Agencies' Interpretation.

1. The Agencies Have Always Agreed That The Corps Has Exclusive Authority Over Fill Material.

Over the years, the agencies have been consistent on the central point at issue in this case: that the Corps has exclusive jurisdiction, under Section 404, to issue permits for the discharge of dredged or fill material and that discharges of such material are not subject to permitting by EPA under Section 402 or to EPA's effluent limitations applied thereunder.

In 1973, in one of its first CWA rulemakings, EPA promulgated a regulation providing that "[d]redged or fill material discharged into navigable waters" does "*not require an NPDES [i.e., Section 402] permit*." 38 Fed. Reg. 13,530 (1973) (codified at 40 C.F.R. § 125.4(d) (1973)) (emphasis added). That regulation is still in place today, in virtually identical form:

> The following discharges *do not require NPDES permits*:
>
> * * *
>
> (b) Discharges of dredged or fill material into waters of the United States which are regulated under section 404 of CWA.

40 C.F.R. § 122.3(b) (emphasis added). Thus, if a discharge meets the regulatory definition of "dredged or fill material," it has *never* required a Section 402 permit from EPA.

In 1986, the Corps and EPA adopted a Memorandum of Agreement ("MOA") between them. The MOA governed the process by which the agencies would determine whether a discharge was "fill material" regulated by the Corps under Section 404, or other material regulated by EPA under Section 402. 51 Fed. Reg. 8,871 (1986).[3] The agencies reconfirmed that the Corps had exclusive jurisdiction to permit discharges meeting the definition of fill material: "[d]ischarges listed in the Corps definition of 'discharge of fill material,' remain subject to section 404 even if they occur in association with discharges of wastes meeting the criteria * * * for section 402 discharges." 51 Fed. Reg. 8,871.

Thus, the agencies have been consistent that discharges of fill material are regulated by the Corps under Section 404 and are not subject to the EPA effluent limitations that are applied under Section 402. Indeed, both agencies stated unequivocally in 2002 that "EPA has *never* sought to regulate fill material under effluent guidelines." 67 Fed. Reg. 31,135 (2002) (emphasis supplied).

2. The 2002 Fill Rule.

Although they have been consistent on this basic division of authority, the federal agencies have not always had a uniform definition of what constitutes "fill material." But since 2002, the agencies have had a uniform definition, which has not been challenged in this case. And under that definition,

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[3] This determination was made in light of the Corps' then-applicable definition of fill material, which excepted discharges with the purpose of waste disposal. *See* 67 Fed. Reg. 31,129, 31,138 (2002); 33 C.F.R. § 323.2(e) (2002).

the tailings discharges at issue unquestionably constitute fill material.

By way of background, both the Corps and EPA adopted interim final rules in 1975 defining fill material as pollutants that "replac[e] an aquatic area with dry land or * * * chang[e] the bottom elevation of a water body for any purpose." 40 Fed. Reg. 31,325 (1975); 40 Fed. Reg. 41,298 (1975). As originally proposed, the definition would have "exclud[ed] material * * * subject to Section 402 of the [CWA]," 40 Fed. Reg. 19,770, 19,772, 19,774, 19,776, 19,795 (1975), but that exclusion was *not* adopted in the interim final rules.

Then, in 1977, the Corps adopted a purpose-based test for determining which discharges fell under its Section 404 authority. It defined "fill material" as any discharge that had the primary *purpose* of replacing an aquatic body or raising its bottom elevation. 42 Fed. Reg. 37,145 (1977). Meanwhile, EPA continued its *effects*-based test, which placed under the Corps' Section 404 authority "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body *for any purpose*." 53 Fed. Reg. 20,774 (1988) (emphasis added). "The difference complicated the regulatory program for some solid wastes discharged into waters of the U.S." because parties were unsure under which permit program their discharges fell. 53 Fed. Reg. 20,764 (1988).

That confusion led the Corps and EPA to promulgate a joint definition of "fill material" in 2002, known as the "Fill Rule". 67 Fed. Reg. 31,129 (2002). The rule adopted EPA's "effects-based" test, defining fill material as "material placed in the

waters of the United States where the material has the effect of: (i) replacing any portion of a water of the United States with dry land; or (ii) changing the bottom elevation of any portion of a water of the United States." 33 C.F.R. § 323.2; 40 C.F.R. § 232.2. The agencies declared that the joint definition was advantageous over the purpose-based definition because its objectivity would yield more consistent results and because "discharges with similar environmental effects will be treated in a similar manner under the regulatory program." 67 Fed. Reg. 31,132-33. Although the definition, as originally proposed, would have excluded "discharges covered by proposed or final effluent limitations guidelines and standards under sections 301, 304 or 306 of the Clean Water Act," 65 Fed. Reg. 21,299 (2000), the final definition removed that exclusion.

The regulations also addressed the precise kind of discharge at issue in this case. The Fill Rule expressly provides that the discharge of "fill material" includes the "placement of overburden, slurry, or tailings, or similar mining-related materials." 33 C.F.R. § 323.2(f). As if this were not clear enough, the agencies further stated that "*any* mining-related material that has the effect of fill when discharged will be regulated as 'fill material,'" and that "the section 404 program is the most appropriate vehicle for regulating overburden and other mining-related materials." 67 Fed. Reg. 31,135 (emphasis added). The agencies also clarified that they would "maintain [their] existing approach to regulating pollutants under either section 402 or 404 of the CWA." *Id.* Thus, as noted above, fill material would not require a Section 402 permit and thus would not be subject to EPA effluent limitations applied thereunder. Instead, such material would be subject to the Corps'

jurisdiction under Section 404, and the separate regulations governing that program.

C. The Kensington Project.

Since 1990, Coeur Alaska, Inc. ("Coeur") and its predecessor have worked with federal and state agencies to develop the historic Kensington Mine, a gold mine located in Southeast Alaska. The Corps, EPA, the U.S. Forest Service, and the State have studied the Kensington Mine Project thoroughly, resulting in three environmental impact statements, several records of decision in 1992, 1997, 2004, and 2006, and numerous other studies, plans, and memoranda. *See* JA209a-11a, 340a-42a. All told, more than 900 studies have been completed, at a cost of over $26 million, that demonstrate the project's environmental soundness. Ninth Circuit Supplemental Excerpts of Record ("SER") 800.

1. Tailings Disposal Options.

"When a mine is developed, one of the key considerations for state and federal regulators is a determination of where the resulting mine tailings will be disposed." SER835. Tailings are ground up rock and earth left over after minerals are extracted; for the Kensington Project, they will be physically similar to wet sand. Ninth Circuit Excerpts of Record ("ER") 77. Over the more than 15 years that the Project was in the permitting process, Coeur, in conjunction with state and federal agencies, evaluated multiple alternatives for storing the discarded tailings from which the gold will have been extracted. JA221a-24a.

The agencies were presented with several variations on two basic options for disposing of the tailings after they leave the mine: (1) a dry tailings facility and (2) wet tailings storage. The proposals for a dry

tailings facility involved filling in wetlands and then placing the tailings on top of the filled area. JA221a; SER860-61. Wet tailings storage, by contrast, involves treating the tailings and placing them in a nearby waterbody. JA222a-24a; SER861-63. Given the prevalence of regulated waters and wetlands near the mine—a common occurrence in Alaska, where the Corps has asserted CWA jurisdiction over more than 50% of the state *see* Alaska Pet. 31—there were no practicable alternatives that did not involve filling wetlands or waterbodies.

In November 2001, Coeur submitted the wet tailings storage proposal at issue in this case. The proposal involves backfilling 40% of tailings into the mine and placing the remainder as "fill material" in a secure impoundment created in Lower Slate Lake, a nearby 23-acre lake. The tailings were to be transported to the lake from the mine's mill in slurry form. JA482a. The tailings slurry is 55% solid by weight. JA482a; ER290, 302.

The State expended significant resources in conducting numerous tests of its own, and in contracting to have independent studies performed. JA156a-57a, 256a-65a; SER801. As a result of those tests and other data, the State determined that placing the mine tailings in Lower Slate Lake is the environmentally preferable alternative. JA225a. After several tests showed "no toxic effects associated with the tailings," the State found that "the toxicity risks associated with the tailings will be low both during and after mining operations." JA156a. Metals concentrations in the Kensington tailings are comparable to those in nearby lake sediments, SER746, and most of the non-toxic chemicals added in the mill do not remain in the tailings, JA191a,

343a-44a, 481a. No cyanide or arsenic will be added in the mill to recover the gold, and final processing of the ore will be offsite. SER853.

One test found no statistical difference between the toxicity of the tailings and associated undiluted residual milling reagents, as compared to the lake's natural sediment. JA156a. And although another test indicated that the undiluted residual reagents might have potential toxicity, the State does not view that test as significant in part because that material will always be substantially diluted during operations. *Id.* The fill would increase pH and aluminum levels around the discharge source, but they would be "rapidly neutralized" and would "decrease to natural levels" because of "geochemical interactions and intermixing with [lake] water." SER747. Thus, it is anticipated that any toxic effects around the discharge pipe will dissipate very rapidly. JA483a (District Court finding).

Because of its relatively inhospitable characteristics, Lower Slate Lake is a "limited habitat * * * [with a] non-diverse, sparsely populated, assemblage of small fish." JA129a. Much of the lake does not support life due to its depth and topography. JA137a. Because the tailings fill will have minimal impact on the chemical composition of the water in Lower Slate Lake, its impact will be physical not chemical. SER961. Thus, it has been estimated that most aquatic life in the lake would be lost initially due to the fill characteristics of the tailings, rather than to any toxicity. JA483a. The benthic (bottom-dwelling) aquatic life would simply be covered by the fill material, *id.*, as would be expected from a large-scale fill operation.

The approved plan, however, requires restoration of the lake in a way that would "provide at least equivalent aquatic habitat and productivity as it does currently." JA484a. In fact, the new shallower depth of Lower Slate Lake resulting from the tailings deposit could make the environment friendlier to growth of organism populations. JA137a-40a; SER748. "[S]ome colonization of the shallower tailings would occur after [mine] closure and * * * conditions would improve in time so that the overall productivity of the closed facility could be higher than currently present." *Id.* And "over an extended period, the tailings would be covered by natural materials" entering the lake from its tributary creek. SER750. In case estimates are incorrect, however, Coeur is prepared to cap the tailings with native materials. *Id.* Thus, even though there likely will be some short-term loss of productivity, "because this is a largely isolated population and lake productivity will be restored, the State considers this temporary loss to be acceptable." SER 755. The National Marine Fisheries Service also found that the tailings discharge is not likely to jeopardize protected marine mammals or destroy or adversely modify designated critical habitat. SER825.

The approved plan also requires Coeur to engage in extensive activities to mitigate any environmental effects. These include methods to filter out and confine suspended particles, as well as adding non-toxic precipitates to promote rapid settling of the tailings. JA275a, 388a, 481a. As a result, the "settled tailings will not re-suspend." SER960. Coeur has also posted a bond to assure compliance with an approved reclamation plan and with long-term maintenance and monitoring of the impoundment. JA484a n.25, JA255a.

The Corps has determined that the wet tailings storage would cause a permanent loss of only 3.44 acres of waters of the United States while greatly enlarging the lake's surface area. JA359a; SER862-63. By contrast, each of the dry tailings facility alternatives would cause a permanent loss of at least *108* acres of waters of the United States—five times the size of Lower Slate Lake—due to the necessary filling of wetlands prior to the tailings storage on the resulting dry land. JA365a; SER860-61. These wetlands would be replaced by an enormous stack of tailings, 100 to 150 feet high and thousands of feet in both width and length, that would be highly visible to cruise ships and others using nearby coastal waters. *See* JA193a-94a; SER669-70, 723, 725.

2. The Permits.

Because the plan involved fill material as expressly defined in the Fill Rule, *see* 33 C.F.R. § 323.2(e), (f), Coeur sought a Section 404 permit from the Corps. In May 2004, both EPA and the Corps "agree[d] that * * * the discharge of the mine tailings into the impoundment is subject to permitting under CWA section 404, which governs the discharge of dredged or fill material." JA143a. They further agreed that "the regulatory regime applicable to discharges under section 402, including effluent limitations guidelines and standards, such as those applicable to gold ore mining (see 40 C.F.R. Part 440, Subpart J) do not apply to the placement of the tailings into the proposed impoundment." JA144a-154a. By contrast, they concluded that any discharge of pollutants coming *from* the impoundment to downstream water would require a Section 402 permit from EPA and would thus be subject to effluent limitations. *Id.* Ultimately, Coeur obtained both the 404 permit for

fill discharge into the lake impoundment and a 402 permit for discharge from the impoundment.

In December 2004, the Forest Service, with the Corps as a cooperating agency, issued a final supplemental environmental impact statement ("FSEIS") evaluating the various tailings storage options.[4] The FSEIS found that the plan that included using tailings as fill material in the lake "provide[d] the best combination of components to minimize ground disturbance, reduce impacts to wetlands, provide safe and efficient transportation of workers, and reduce on-site fuel storage with the related risk of fuel spills within the framework of existing laws, regulations, and policies while meeting the stated purpose and need." JA218a. The Corps subsequently adopted the FSEIS. JA342a.

In 2005, the Corps granted a Section 404 permit for the wet tailings facility. JA266a. After this litigation was filed, the Corps then suspended the permit to conduct yet another analysis, and issued a Revised Record of Decision ("ROD") in early 2006. The ROD concluded that using the tailings as fill in the lake, with proposed mitigation measures, is the "least environmentally damaging practicable alternative" and therefore the "environmentally preferable alternative." JA354a. Weighing the alternatives, the Corps determined that "[t]he permanent loss of wetland functions and values" in the proposed dry tailings facilities "is more damaging and outweighs the temporary losses to the lake and its associated values and functions" resulting from a wet tailings

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[4] The Forest Service was designated the lead agency for the environmental review because the mine is situated within the Tongass National Forest.

facility. SER872. The State agrees with that assessment. JA225a.

Although EPA differed with the Corps and the State over the preferable tailings disposal alternative, it did not exercise its veto right under Section 404(c) of the CWA. Instead, it granted Coeur a Section 402 permit for any discharges coming *from* the impoundment into downstream waters. JA342a. Under that permit, water from the tailings impoundment that is not recycled back to the mill will pass through a water treatment plant to ensure that water quality standards are met. JA344a. The EPA permit places limits on contaminant concentration and the tailings impoundment may not release any water containing "any floating solids, visible foam in other than trace amounts, or oily wastes that produce a sheen on the surface of the receiving water." JA321a-31a. Thus, the water coming from the tailings impoundment will not adversely affect downstream waters. JA197a.

As required by Section 401 of the CWA, the State further certified that the plan met its own water quality standards. JA256a-65a. The Project also received additional state and local permits. JA227a-28a. Collectively, these permits require extensive design and operating elements, as well as numerous monitoring and other requirements to protect water quality and the environment. *See, e.g.*, JA226a-27a, 261a-64a, 278a, 326a-31a; SER674-85.

D. The Decisions Below.

Respondents Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation (collectively, "SEACC") sued the Corps in the District of Alaska to enjoin its grant of the permit. JA479a. The State, Coeur, and Goldbelt, Inc. (a local native

corporation that received a related permit) intervened as defendants. *Id.*

SEACC contended that Coeur's discharge of tailings into the impoundment could not be permitted because it allegedly does not comply with an EPA performance standard governing discharges of "process wastewater" from "froth flotation" mines like Coeur's. *See* 40 C.F.R. § 440.104(b)(1). The District Court, however, found the Corps' permit valid. JA495a. It summarily rejected SEACC's contention that EPA's permitting authority and effluent limitations applied, holding that "[i]f the permit was properly issued under § 404, those provisions of the CWA are inapplicable." JA488a n.35.

The Ninth Circuit reversed with directions to vacate the Corps' permit. Even though Section 404 authorizes the Corps to permit discharges of any fill material, and even though Section 404—unlike Section 402—does *not* require that such discharges follow EPA effluent limitations, the court held that the CWA unambiguously provides that "the NPDES program administered by EPA under § 402 is the only appropriate permitting mechanism" for the discharges at issue. JA533a. The Court further concluded that no such Section 402 permit could ever issue for the discharge of tailings, because the discharge could not meet the EPA effluent limitation generally mandating zero discharge of "process wastewater" from this sort of mine. JA537a, 550a.

Finally, the court held that the "regulatory history" showed that neither agency intended for the Corps to have permitting authority under Section 404 where a discharge is subject to an EPA effluent limitation. JA535a. Based on carefully selected snippets from agency statements and memoranda—rather than

actual regulations—the court held that "[t]he agencies could not have been more clear" in articulating their "preferred approach" that the Corps authority under Section 404 applies only to material not subject to EPA effluent guidelines. Pet. App. 29a.

This Court granted petitions for certiorari filed by both the State and Coeur. The federal government defendants are respondents supporting the petitioners on the merits.

SUMMARY OF THE ARGUMENT

The CWA is unambiguous: fill material is not subject to the Section 402 permitting scheme or EPA's effluent guidelines applied under it. And even if the statute were ambiguous on that point, dispositive deference is owed both to the agencies' division of regulatory responsibilities and to their interpretation of their own regulations. Accordingly, the Court should reverse the Ninth Circuit's judgment and uphold the permit authorizing what both the State and the Corps have found, after careful consideration, to be the most environmentally protective option for disposing of the tailings.

The plain language of Section 404 authorized the Corps to grant the permit at issue. The tailings discharge concededly involves "fill material" as the agencies have authoritatively construed that term. And Section 404 provides that the Corps "may issue" a permit for the discharge of that material, provided the discharge complies with the Section 404(b)(1) Guidelines and is not vetoed by EPA. There is no dispute that the permit at issue satisfies all requirements of Section 404. The Corps therefore did not exceed its authority in issuing it.

EPA's separate Section 402 permitting authority is inapplicable on its face. Section 402 allows EPA to grant permits "[e]xcept as provided in * * * [Section 404]," 33 U.S.C. § 1342(a), thereby confirming that the Corps, and not EPA, has exclusive permitting authority over fill material. And Section 404, unlike Section 402, does not mandate compliance with EPA effluent limitations. The disparate inclusion of such restrictions shows that Congress intended that these limitations be mandatory only in permits issued under Section 402 and not those issued under Section 404. Indeed, Congress has shown that it knows how to authorize the application of effluent limitations to other CWA permitting schemes when it wants to. It amended EPA's otherwise separate aquaculture permitting scheme to mandate compliance with Section 402, *see* 33 U.S.C. § 1328, and it expressly authorized EPA to apply one narrow set of effluent limitations to one kind of Section 404 material, *see* 33 U.S.C. § 1317(a)(5). But it did not require the Corps to apply the effluent limitation invoked by the Ninth Circuit in this case.

The provisions relied on by the Ninth Circuit—Sections 301(a), 301(e) and 306(e) of the CWA—do not provide otherwise. These sections merely clarify that effluent limitations are mandatory where other provisions of the CWA make them applicable. They do not answer the question here—whether effluent limitations are applicable in the first place to discharges of fill material under a permit that complies with all provisions of Section 404. They are not, as Sections 404 and 402 make clear.

The history of the CWA further confirms the Ninth Circuit's error. As originally proposed in the Senate, the CWA contained no Section 404 and would have

subjected fill material to EPA's permitting authority under Section 402 and to EPA-promulgated effluent limitations. The House bill, by contrast, would have continued the Corps' exclusive authority over fill material with only minimal EPA environmental oversight. A compromise was then reached in conference committee. As enacted, the CWA adopted the House approach giving the Corps exclusive authority over fill material, but modified it to give EPA environmental oversight *within* the Section 404 process, both through the Section 404(b)(1) Guidelines and through EPA's Section 404(c) veto right. The Ninth Circuit vitiated that compromise and instead imposed the very permitting scheme that Congress had rejected.

But even if the Court were to conclude that the CWA does not clearly mandate the interpretation reached by the agencies, the statute is at a bare minimum ambiguous, and the agencies' interpretation is entitled to deference. For more than 35 years, formal agency regulations have consistently provided that: (1) discharges of fill material do not require EPA permits; (2) all such discharges are subject instead to the Corps' authority under Section 404; and (3) such permits may be granted without strict adherence to EPA-promulgated effluent limitations.

That interpretation is reasonable in light of the statutory language and the inherent differences—recognized in *Rapanos* v. *United States*, 547 U.S. 715 (2006)—between the fill material regulated by the Corps and other pollutants regulated by EPA. Unlike more mobile pollutants subject to EPA regulation, fill material is typically stationary and displaces water. Thus, it is reasonable for the agencies to regulate fill material consistently based

on its environmental effects rather than its source. The Ninth Circuit's rule, while barring the lake discharge, would not prohibit Coeur from filling the entire lake (or another waterbody or wetlands) with dirt and rock not subject to effluent limitations and then dumping the similarly-constituted tailings on top. By contrast, the plan approved by the Corps subjects the lake discharge to stringent environmental controls while obviating the need to destroy at least 108 acres of wetlands in favor of an unsightly 100-foot-high tailings stack on the Alaskan coast. And downstream waters would be fully protected by EPA's Section 402 permit requirements, which apply to any discharges coming from the tailings impoundment.

Finally, the agencies did not commit plain error in interpreting their own regulations. The regulations have always provided that discharges of fill material are not subject to NPDES permitting requirements. Nothing in the snippets from regulatory preambles, responses to comments, and internal memoranda cobbled together by the Ninth Circuit is inconsistent with, much less overrides, the plain language of the regulations. To the contrary, the agencies made clear in 2002 that EPA has never subjected fill material to effluent limitations, and the statements relied on by the Ninth Circuit merely confirm that the Corps has exclusive authority over all discharges meeting the regulatory definition of fill material.

ARGUMENT

Under the familiar standards of *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a court "must give effect to the unambiguously expressed intent of Congress," but if the statute is "silent or ambiguous with respect to

the specific issue" the court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 843-44. The Ninth Circuit held that the CWA unambiguously subjects a discharge of fill material to EPA's Section 402 permitting authority if the discharge is subject to an effluent limitation. But the CWA unambiguously provides that the Corps, not EPA, has exclusive permitting authority over all discharges of fill material, which are governed by separate regulations. However, even if the statute were not clear on that point, it is at the very least ambiguous and the Ninth Circuit erred by not deferring to the agencies' reasonable resolution of the issue, and by overriding their interpretation of their own regulations.

I. THE CWA IS UNAMBIGUOUS THAT THE CORPS HAS EXCLUSIVE AUTHORITY UNDER SECTION 404 TO PERMIT DISCHARGES OF FILL MATERIAL, SUBJECT TO EPA'S VETO RIGHT.

A. Sections 402 And 404 Are Separate Permitting Programs Governed By Different Regulations.

Section 404 provides that the Corps "may issue permits" for the discharge of "fill material" into specified disposal sites in U.S. waters if the sites comply with the Section 404(b)(1) Guidelines and EPA does not veto. 33 U.S.C. § 1344. The discharges at issue concededly constitute "fill material" as the agencies have authoritatively defined that term, and the Ninth Circuit did not hold (nor did SEACC argue) that that definition is invalid. Thus, the Corps properly issued a permit under Section 404, subject to stringent environmental controls.

The Ninth Circuit nevertheless held that the CWA carves out an exception to the Corps' authority to issue Section 404 permits when the fill material comes from a source that is subject to EPA's effluent limitations. If it does, according to the Ninth Circuit, the discharge of fill material must be permitted under Section 402, not Section 404. But nothing in the CWA exempts fill material from the Section 404 program based on where it comes from. Rather, the statute unambiguously allows the Corps to permit any discharge of fill material, provided the permit complies with the Section 404(b)(1) Guidelines and is not vetoed by EPA.

Sections 404 and 402 provide an unambiguous statement of Congress's intent. Far from carving out an exception to Section 404 for discharges that might otherwise implicate Section 402, Congress did the converse: it expressly carved out an exception to Section 402 for discharges—like the one at issue here—that are subject to Section 404. Thus, it is not surprising that in *Rapanos*, the plurality noted that Section 404 is a "separate permitting program" from Section 402, 547 U.S. at 744-45, and Justice Kennedy expressly recognized what the statute provides: "*[a]part from dredged or fill material,* pollutant discharges require a permit from the Environmental Protection Agency." *Id.* at 760 (emphasis added). The Ninth Circuit, by contrast, held that the discharges of fill material at issue here do require an EPA permit. JA533a.

Section 404 provides that the Corps "may issue" a permit for any discharge of dredged or fill material provided the requirements of that section are met. Yet the Ninth Circuit held that the Corps may *not* issue such a permit in this case even though every

requirement of Section 404 has concededly been met, and that Section 402 and EPA effluent limitations apply instead. That is wrong. In Section 402, Congress gave EPA authority to issue permits for discharges of pollutants *"[e]xcept as provided in * * * [Section 404]."* 33 U.S.C. § 1342(a) (emphasis added). This express exception thus makes clear that the two permitting schemes are mutually exclusive, and that fill material falls within the Corps' exclusive authority under Section 404 even if it might otherwise have fallen within EPA's authority under Section 402. Put another way, EPA may issue a permit for the discharge of any pollutant, except if the pollutant constitutes "dredged or fill" material and is thus subject to the Corps' permitting authority.

There is no other reasonable reading of these provisions. Indeed, Section 402 is one of several places in the CWA where Congress established a general power or requirement and then limited it by stating that it applies "except as provided in" another provision. For instance, Section 404 itself exempts some discharges from all permitting requirements "except as provided in" the next paragraph, which requires a permit if the discharge intentionally impairs the flow or circulation of the navigable water. 33 U.S.C. § 1344(f).[5] In each of these sections, just as in Section 402, Congress made

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[5] *See also* 33 U.S.C. § 1311(j)(1)(A) (time limits apply to applications to modify certain effluent limitations "except as provided in" provisions for extending the deadline), 33 U.S.C. § 1322(f)(1)(A) (states may not regulate marine sanitation devices "except as provided in" separate section allowing such regulations if they are more stringent than federal standards); 33 U.S.C. § 1365 (citizen may commence civil action under the CWA "except as provided in" the next section, which imposes notice and opportunity to cure requirements).

clear that an action that would otherwise be authorized is not authorized if it falls within the ambit of another provision. The exception for Section 404 in Section 402 would be meaningless if EPA could issue a Section 402 permit for a discharge that meets the criteria of Section 404.

Moreover, Congress explicitly required that permits granted by EPA under Section 402 comply with EPA effluent limitations promulgated under Sections 301 and 306, *see* 33 U.S.C. § 1342(a)(1)(A), but placed no such restriction in Section 404. Instead, Section 404 permits must comply only with the separate Section 404(b)(1) Guidelines. As the Ninth Circuit itself recognized, JA531a-32a, "if 'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *S.D. Warren Co.* v. *Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 384 (2006) (quoting *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997)).

Thus, when Congress enacts a restriction in one section of a statute but not in a closely related section the restriction is not intended to apply to the latter. For example, in *Russello* v. *United States*, 464 U.S. 16 (1983), the Court rejected an argument that the RICO forfeiture provision, 18 U.S.C. § 1963(a)(1), reaches only an interest in a RICO "enterprise," holding that "[h]ad Congress intended to restrict § 1963(a)(1) to an interest in an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2)." *Id.* at 18. *See also United States* v. *Granderson*, 511 U.S. 39, 63-64 (1994) (Kennedy, J. concurring) (presumption that disparate inclusion of terms is intentional is

stronger when the two provisions are closely related). So too here: Congress's express inclusion of effluent limitations in Section 402 but not the closely related Section 404 shows that it did not intend to apply those limitations to the latter permitting scheme.

Congress has demonstrated that it knows how to apply effluent limitations to a separate permitting scheme when it wants to. Section 318 of the CWA, 33 U.S.C. § 1328, allows EPA to issue permits for aquaculture projects, and just like Section 404 it is also an express exception to Section 402. *See* 33 U.S.C. § 1342 ("Except as provided in sections [318] and [404] * * *."). As originally enacted, Section 318 provided only that the EPA Administrator was to "establish * * * procedures and guidelines he deems necessary to carry out this section." Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 318, 86 Stat. 877. But in 1977, Congress amended that section to provide that aquaculture permits must be issued "pursuant to [Section 402]" and that the regulations "shall require the application to such discharge of each criterion, factor, procedure, and requirement applicable to a permit issued under [Section 402], as the Administrator determines necessary to carry out the objective of this chapter." 33 U.S.C. § 1328(b) (amended by Clean Water Amendments of 1977, Pub. L. No. 95-217, § 63, 91 Stat. 1599). Congress, however, has provided no such language in Section 404, even though it amended that section in the same law and since then. *See* Pub. L. No. 95-217, § 67 (1977), 91 Stat. 1600; Water Quality Act of 1987, Pub. L. No. 100-4, § 313(d), 101 Stat. 45 (1987).

Moreover, far from mandating that all effluent limitations be applied to dredged or fill material,

Congress specifically authorized EPA, in its discretion, to subject dredged (but not fill) material to one narrow category of effluent limitations. In Section 307 of the CWA, which authorizes EPA to establish effluent standards or prohibitions for specified toxic pollutants, Congress provided that "[a]ny disposal of dredged material may be included in such a category of sources after consultation with the Secretary of the Army." 33 U.S.C. § 1317(a)(5). That Congress specifically provided that only one kind of effluent limitation "may" be applied to dredged material, and then only after consultation with the Secretary of the Army, demonstrates clearly that Congress did not intend to mandate that all effluent limitations automatically apply to all discharges of dredged and fill material.[6]

Congress expressly restricted EPA's Section 402 permit authority with Sections 301 and 306's effluent limitations. Just two sections later, Congress did not impose the same limits on the Corps' parallel permit program. And Congress has shown that it knows how to authorize EPA to apply effluent limitations

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[6] That is not to say that EPA and the Corps lack discretion to incorporate effluent limitations, where appropriate, into the Section 404(b)(1) Guidelines. The Guidelines have long prohibited discharges that violate Section 307 toxic effluent standards or prohibitions. *See* 40 C.F.R. § 230.10(b)(2). Even though EPA had not exercised its authority to apply the limitations directly to dredged material under Section 307(a)(5), the Guidelines incorporate them because these toxic substances "are a primary concern in the evaluation of the effects of proposed discharges of dredged or fill material under section 404 of the Act." 44 Fed. Reg. 54,222, 54,235 (1979). Tellingly, however, the Guidelines do not incorporate, reference, or mandate the effluent limitation applied by the Ninth Circuit in this case.

both to a separate permitting scheme and to Section 404 material itself. The only reasonable conclusion is that Congress did not intend those limits to apply to Section 404 permits.

B. The Provisions Relied On By The Ninth Circuit Do Not Provide Otherwise.

The CWA provisions relied on by the Ninth Circuit—Sections 301(a), 301(e) and 306(e)—do not establish the invalidity of the permit at issue. Rather, as applicable here Section 301(a) provides only that a discharge of fill material must have a Section 404 permit. And Sections 301(e) and 306(e) simply provide that effluent limitations must be applied in accordance with the provisions of the CWA and only where applicable. For the reasons set forth above, they do not apply to discharges of fill material permitted by the Corps under Section 404.

Section 301(a). Section 301(a) provides that "[e]xcept as in compliance with this section and [CWA] sections 302, 306, 307, 318, 402, *and* 404 * * *, the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a) (U.S. Code sections replaced with CWA sections) (emphasis added). According to the Ninth Circuit, the use of the word "and" means that any discharge has to comply with everything in *all* of the listed sections, including the effluent limitations of Sections 301 and 306. JA531a.

The word "and" cannot bear the weight put on it by the Ninth Circuit. *See, e.g.*, *United States* v. *Fisk*, 70 U.S. 445, 447 (1866). The numerous statutes cited in Section 301(a) cover different—and often mutually exclusive—ground. All discharges cannot comply with *all* of the provisions cited—they can only comply with the applicable ones. For example, Section

301(a) refers to CWA § 318, which authorizes permits for the very narrow set of discharges "associated with an approved aquaculture project." 33 U.S.C. § 1328. Obviously, not all discharges need to comply with that provision. Similarly, Section 301 effluent limitations and Section 306 performance standards do not apply to the same discharges, since the former govern existing sources and the latter govern new ones.

There is nothing unusual or ungrammatical about this commonsense reading of the statute. For example, if a hypothetical statute were to prohibit an action "except as in compliance with the Rules of Civil and Criminal Procedure," it plainly would not require compliance with *both* sets of rules, but rather only the applicable one. The same is true here. Indeed, even SEACC concedes that "not every one of the enumerated provisions in Section 301(a) applies to every discharge." SEACC Opp. to Pet. for Writ of Cert. 20. Similarly, the Ninth Circuit stated that "[t]he use of 'and' as a connector * * * indicates that Congress intended for effluent limitations and standards of performance to apply to all *applicable* discharges." JA531a (emphasis added). But that is the same as saying that effluent limitations apply to discharges they are applicable to. That tautology begs the question of whether those limitations are applicable in the first place to discharges of fill material subject to the Corps' permitting authority under Section 404. Unlike in Section 402, Congress did not make effluent limitations applicable to permits for fill material granted under Section 404, and Section 301 does not provide otherwise.

In fact, Section 301(a) is ultimately satisfied regardless of how one reads it. For Congress has

expressly provided that compliance with a Section 404 permit "shall be deemed compliance" with all of Section 301 for purposes of both governmental and citizen enforcement. *See* CWA § 404(p), 33 U.S.C. § 1344(p) ("Compliance with a permit issued pursuant to this section * * * shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with section[] 1311 * * * of this title.").[7] Thus, where, as here, a permit has been issued under Section 404, Congress has "deemed" compliance with that permit to be compliance with all provisions of Section 301, necessarily including Section 301(a). Given that Section 404(p) precludes Section 301(a) from being enforced against Coeur's discharges of fill material pursuant to its Section 404 permit, Section 301(a) cannot be grounds to invalidate that permit here.

In any event, even if the Ninth Circuit were correct that Coeur's proposed discharges must comply with everything in Sections 301, 306, 402 and 404, its permit would still be valid. The requirements of Section 404 have concededly been satisfied. Because Section 402 contains an exception for situations covered by Section 404, there has in fact been compliance with Section 402 as well. And as next shown, the permit contravenes no express requirement of Sections 301 or 306.

Sections 301(e) and 306(e). The Ninth Circuit's reliance on Sections 301(e) and 306(e) is flawed for similar reasons. These provisions mandate application of effluent limitations only "in accordance with the provisions of [the CWA]," 33 U.S.C. § 1311(e), or where a source would "violate" an "applicable"

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[7] The cited sections, 33 U.S.C. §§ 1319 and 1365, contain the provisions for enforcement of the CWA.

performance standard. 33 U.S.C. § 1316(e). As such, they do not decide the question in this case or override the plain language of Sections 402 and 404.

Section 301(e) provides that "[e]ffluent limitations * * * shall be applied to all point sources of discharge of pollutants *in accordance with the provisions of [the CWA]*." 33 U.S.C. § 1311(e) (emphasis added). Thus, one must look to *other* provisions of the CWA to determine whether effluent limitations apply.[8] There is no dispute that effluent limitations are applied where a discharge is subject to permitting under Section 402 because Section 402 says that. But where a discharge constitutes fill material, it is expressly exempt from Section 402 and nothing in Section 404 or any other provision of the CWA requires application of effluent limitations. Section 301(e) adds nothing to that analysis.

Likewise, Section 306(e) states only that it is unlawful to operate a new source in "violation" of any EPA-promulgated performance standard "applicable to such source." 33 U.S.C. § 1316(e). This provision

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[8] Congress used similar language throughout the CWA, and in every case the added language acts as a limitation on a more general proposition. *See, e.g.*, 33 U.S.C. § 1311(g)(4)(A) (limiting EPA's power to add to list of pollutants "in accordance with the provisions of this paragraph"); 33 U.S.C. § 1320(c) (limiting EPA's implementation of hearing board decisions "in accordance with the provisions of this chapter"); 33 U.S.C. § 1322(g)(2) (requiring Coast Guard to certify sanitation devices if it determines "in accordance with this paragraph" that they meet certain standards, which in turn limit the certification authority by requiring specific tests); 33 U.S.C. § 1325 (limiting salaries of certain personnel "in accordance with the provisions" of general pay rates), 33 U.S.C. § 1342 (limiting revocation, modification, or suspension of Refuse Act permits "in accordance with the provisions of this chapter").

states only that a discharge cannot violate an *applicable* performance standard. It says nothing about whether such standards are actually applicable, or have been violated, when dredged or fill material is discharged under a permit meeting all the criteria of Section 404. As shown above, while Congress made performance standards applicable to discharges subject to permitting under Section 402, it did not make them applicable to discharges of fill material subject to permitting under Section 404. And even if that were not so as a statutory matter, Section 306(e) sets no standards of its own but rather delegates that duty to EPA, thus providing EPA with authority to decide when a discharge is subject to a performance standard within its authority. As noted above, EPA's regulations have expressly provided for more than 35 years that all discharges of dredged or fill material are exempt from NPDES permitting requirements. *See* 40 C.F.R. § 122.3(b). That longstanding regulatory determination is itself dispositive of the issue.

Finally, as noted above, the immunity provision of Section 404(p) provides that compliance with a Section 404 permit is "deemed compliance" for enforcement purposes with Section 301(a). *See* 33 U.S.C. § 1344(p). Section 301(a), in turn, provides that any discharge of pollutants must comply, *inter alia*, with Section 306 to the extent applicable. *See* 33 U.S.C. § 1311(a). Therefore, compliance with a Section 404 permit necessarily constitutes compliance with Section 306, even if that provision were otherwise applicable to the discharges at issue.

Nor is there any merit to the Ninth Circuit's view that, if fill material were not subject to effluent limitations, Congress would have "written § 301 and

§ 306 within § 402, not as separate sections." JA532a. The CWA is a complex statute with numerous interlocking provisions, and both Sections 301 and 306 do more than impose effluent limitations. Section 301(a), for example, contains the basic prohibitory provision of the CWA, and Section 306(c) provides for state enforcement. Thus, writing those sections into Section 402's permitting requirement would not make sense, and nothing can be gleaned from the decision to codify those effluent limitations in separate sections rather than as subsections of Section 402.

The agencies' interpretation does not—as the Ninth Circuit claimed—render sections 301(e) and 306(e) "effectively meaningless." JA532a. These provisions make clear that effluent limitations are mandatory where they apply. This encompasses a wide range of sources and discharges of effluent under the Section 402 permit program. Thus, the Court has held that Section 306(e) evidences Congress's intent that performance standards operate as "absolute prohibitions" not subject to exceptions or variances. *E. I. Du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 138 (1977). But nothing in these statutes provides that effluent limitations are applicable in the first place to discharges of fill material permitted under the separate Section 404 program.

C. The History Of The CWA Confirms The Corps' Exclusive Permitting Role.

Although the plain language of the statute is dispositive, the history of the CWA confirms that Congress never intended for effluent limitations to apply to fill material. *See, e.g.*, *Chevron*, 467 U.S. at 843 n.9 (clarity of statute is to be determined by "employing traditional tools of statutory

construction"). Section 404 was a compromise between those in Congress who wanted to subject all discharges—even of dredged or fill material—to exclusive EPA regulation via effluent limitations, and those who wanted to continue the Corps' traditional regulation of such discharges. Under the compromise, the Corps retained its exclusive permitting authority but EPA was given environmental oversight *within* the Section 404 process. The Ninth Circuit's decision nullifies this carefully crafted legislative compromise.

1. The Corps' Pre-Existing Authority To Permit Discharges Of Mine Tailings.

For more than 120 years, the Corps has had express statutory authority to permit the disposal of mine tailings in the navigable waters of the United States. In 1886, even before it granted more general authority to regulate discharges into navigable waters, Congress authorized the Secretary of the Army to permit the "deposits of debris of mines" within established harbor lines and "under regulations to be from time to time prescribed by him." Rivers and Harbors Appropriations Act of 1886, 24 Stat. 329. That statutory authority has never been repealed, and is presently codified at 33 U.S.C. § 407a. The purpose of this legislation was to allow the Secretary to prevent obstructions to navigation and downstream nuisances caused by mine debris discharges, particularly the afterwash from hydraulic mining. *See* 17 Cong. Rec. 6827-29 (1886) (statements of Sen. Stanford).[9]

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[9] In 1893, the Corps was also given the specific authority to regulate discharges of mine tailings into the waters of the mining areas of California, including by imposing permit conditions requiring impoundment dams or other restraining

In response to this Court's 1888 ruling that no federal common law prohibits obstructions and nuisances in navigable waters, *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1, 8 (1888), Congress determined that the Corps needed additional broad statutory authority to regulate such discharges. It therefore passed a series of laws that were later reenacted as the Rivers and Harbors Act of 1899 ("RHA"). *United States* v. *Pennsylvania Indus. Chem. Corp.*, 411 U.S. 655, 663 (1973).

The RHA, which is still in force today, *see* 33 U.S.C. § 401 *et seq.*, includes the Corps authority, in RHA § 403, to oversee permits for the deposit of fill in navigable waterways. *See* 33 U.S.C. § 403. It also includes a separate provision, commonly known as the Refuse Act, which authorized the Corps to regulate discharges of refuse. *See* 33 U.S.C. § 407. With this legislation, Congress sought to prevent injury to U.S. waters "caused in part by obstacles that impeded navigation and in part by pollution." *United States* v. *Standard Oil Co.*, 384 U.S. 224, 229 (1966).

Prior to the CWA, the Corps issued permits for the deposit of mine tailings under RHA § 403 rather than the Refuse Act. *See, e.g.*, *Reserve Mining Co.* v. *EPA*, 514 F.2d 492, 530 (8th Cir. 1975) (Section 403 permits issued for discharge of tailings into Lake Superior). But the Section 403 process was inadequate, because it focused on navigational

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works and settling reservoirs. *See* 33 U.S.C. §§ 661 et seq. (establishing California Debris Commission composed of Corps officers). This statutory authority also still exists, having been transferred to the Secretary of the Army in 1986. *See* Water Resources Development Act of 1986, Pub. L. 99-662, tit. XI, § 1106, 100 Stat. 4229 (1986).

rather than environmental issues. *See id.* at 531. Congress's solution was Section 404 of the CWA, which continued to vest the Corps with exclusive jurisdiction over discharges of fill material but incorporated EPA's environmental oversight through its promulgation of the Section 404(b)(1) Guidelines and its Section 404(c) veto right.

2. The CWA Compromise.

The separate CWA permit programs under Sections 402 and 404, and the agencies' duties under them, were a compromise reached during the conference between the House and the Senate. As reported out of committee, the initial Senate bill placed *all* discharges—including of dredged and fill material—under EPA's Section 402 permitting authority, including its effluent limitations. *See* S. 2770, 92nd Cong. § 402 (as reported by S. Pub. Works Comm., Oct. 28, 1971). A proposal on the Senate floor would have given the Corps exclusive authority to issue permits for the discharge of dredged material under a new Section 404, with the proponent explaining that, under this provision, "[t]he Secretary of the Army will not be obligated to require strict compliance with the effluent requirements established by the [EPA]." 117 Cong. Rec. 38854 (1971) (statement of Rep. Ellender). That proposal was defeated in the Senate, in favor of an amendment to Section 402 that would have involved the Corps in the EPA permitting process for discharges of dredged material. *See* 117 Cong. Rec. 38856, S38883 (1971); S. Rep. No. 92-414, at 71 (1971).

By contrast, the bill that passed the House contained Section 404, which gave the Corps sole authority over dredged or fill material, subject to

only minimal input from EPA. *See* 118 Cong. Rec. 10632 (1972). Under that bill, the Corps would have been required to "consult" with EPA and EPA could veto a disposal site for "critical areas," but the Corps could override that veto upon certain findings. *Id.* There was no provision for EPA to promulgate separate Section 404 guidelines. Because the House bill added this separate permitting authority, Section 402 of that bill (unlike its Senate counterpart) contained the explicit exception for Section 404. *Id.* at S10630. EPA opposed the Section 404 permitting process in the House bill, on the view that "all permits * * * should either be issued by EPA or subject to EPA review and concurrence with respect to environmental considerations." H.R. Rep. No. 92-911 at 168 (1972) (comments of EPA).

Congress resolved the dispute through a compromise reached in conference. The conference substitute, which became the CWA, adopted the House bill as modified by EPA's second suggested alternative. It adopted the House's provision for Section 404 as a stand-alone permitting authority that is separate, and specifically exempted, from Section 402. But in order to satisfy the Senate's and EPA's concerns about the need for EPA environmental oversight of the Section 404 process, the compromise added two provisions to the House bill: EPA's authority to promulgate the Section 404(b)(1) Guidelines and its Section 404(c) veto right. Neither of these provisions had appeared in either the House or Senate versions of the CWA.

Senator Muskie, on behalf of the House-Senate conferees, explained the rationale for the compromise:

> The Conferees were uniquely aware of the process by which the dredge and fill permits are presently

> handled and did not wish to create a burdensome bureaucracy in light of the fact that a system to issue permits already existed. At the same time, the Committee did not believe there could be any justification for permitting the Secretary of the Army to make determination [sic] as to the environmental implications of either the site to be selected or the specific spoil to be disposed of in a site.

118 Cong. Rec. 33692, 33699 (1972) (analysis of bill prepared by Sen. Muskie).

The Ninth Circuit's interpretation vitiates this compromise and instead adopts the rejected approach of the initial Senate bill, under which fill material would have been treated as just another pollutant subject to the Section 402 permitting process and EPA-promulgated effluent limitations. Congress, however, explicitly rejected that approach. Its decision to give both EPA and the Corps authority in the Section 404 permitting process was a means to efficiently address both environmental and physical concerns, using the agencies' respective expertise. Indeed, while the EPA was only two years old when the CWA was enacted, the Corps had more than seventy years of experience administering permits for dredged and fill material, including mine tailings. Congress intended to complement that experience with EPA environmental review *within* the Section 404 process, in the form of both separate guidelines developed specifically for dredged and fill material, and EPA's veto right. This Court should apply the CWA as Congress intended.

II. THE AGENCIES REASONABLY RESOLVED ANY AMBIGUITY.

As shown above, the CWA is unambiguous that dredged and fill material subject to permitting under Section 404 is not subject to Section 402 or to the effluent limitations applied by EPA thereunder. But if at a bare minimum the statute is ambiguous on that point, then the Ninth Circuit erred in not deferring under *Chevron* to the agencies' reasonable resolution of their statutory duties.

In 1973, only a year after the enactment of the CWA, EPA promulgated a notice-and-comment regulation—which is still in place today—providing that all dredged and fill material is exempt from all NSDES permitting requirements that are applied to other kinds of pollutants. *See* 38 Fed. Reg. 13530 (1973) (codified as amended at 40 C.F.R. § 122.3(b)). Nearly 30 years later, both agencies confirmed, again after notice and comment, that "EPA has *never* sought to regulate fill material under effluent guidelines." 67 Fed. Reg. 31,135 (2002) (emphasis added). Thus, as the agencies stated, the Fill Rule "determines the basic jurisdiction of the section 404 versus the section 402 program." *Id.* at 31,133. Similarly, the Section 404(b)(1) Guidelines, developed by EPA and the Corps after notice and comment, have never required application of EPA effluent limitations such as the one invoked by the Ninth Circuit here.

Under *Chevron*, these formal statements of agency policy are conclusive so long as they are reasonable. 467 U.S. at 843-44. As the Fourth Circuit has noted in upholding EPA's and the Corps' delineation of their respective CWA authorities, "the resolution among agencies of the line dividing their

responsibilities is just the type of agency action to which the courts must defer." *Kentuckians for the Commonwealth, Inc.* v. *Rivenburgh*, 317 F.3d 425, 446 (4th Cir. 2003). Indeed, even if the agencies' positions had not been arrived at through notice and comment rulemaking, *Chevron* deference would still be warranted given the "interstitial nature of the legal question, the related expertise of the [agencies], the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the [agencies have] given the question over a long period of time." *Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002).

To sustain the agencies' position the Court "need not find that it is the only permissible construction that [they] might have adopted but only that [their] understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment * * *." *Chemical Mfrs. Ass'n* v. *NRDC*, 470 U.S. 116, 125 (1985). The determination at issue easily meets that deferential standard.

1. The agencies' resolution of any ambiguity is unquestionably reasonable in light of the statutory scheme. Indeed, neither SEACC nor the Ninth Circuit ever addressed the issue, focusing instead on the erroneous view that the statute unambiguously prohibited the permit. For the reasons set forth above, the language of the statute, even if ambiguous, reasonably supports a construction under which the Corps has exclusive authority to issue permits for discharges of dredged or fill material, subject only to the requirements of that section and not EPA's separate effluent limitations. Indeed, the very fact that Congress established Section 404 as a stand-alone permitting scheme

separate from Section 402 indicates that it is reasonable for the agencies to subject discharges of dredged and fill material to different standards.

National Ass'n of Home Builders v. *Defenders of Wildlife* 127 S. Ct. 2518 (2007) ("*NAHB*")—issued after the Ninth Circuit ruled in this case—is instructive. In *NAHB*, this Court reversed a Ninth Circuit decision that failed to defer to agencies' determinations of their respective jurisdictions involving the CWA. The Ninth Circuit had held that before transferring Section 402 permitting authority to a state, EPA must comply with a provision of another statute (the Endangered Species Act ("ESA")) administered by a different agency. This Court held that the ESA provision must be read against CWA provisions "whose operation it would implicitly abrogate or repeal if it were construed as broadly as the Ninth Circuit did below." *Id.* at 2534. As a result, the Court was "left with a fundamental ambiguity that is not resolved by the statutory text" because "[a]n agency cannot simultaneously obey the differing mandates." *Id.* Given that "the statutory language * * * [did] not itself provide clear guidance as to which command must give way," the Court found it "appropriate to look to the implementing agency's expert interpretation," which "harmonizes the statutes." *Id.* Because the interpretation was "reasonable in light of the statute's text and the overall statutory scheme," the Court held that it was "entitled to deference under *Chevron*." *Id.*

Even accepting the Ninth Circuit's flawed reasoning, there are conflicting statutory mandates here. Section 404 clearly provides that the Corps may issue permits for the discharge of the fill material at issue here, and Section 402 prohibits

EPA from regulating discharges provided for in Section 404. But, according to the Ninth Circuit, other provisions say that EPA must regulate this discharge of fill material under Section 402. Even if that were right, there would be "a fundamental ambiguity that is not resolved by the statutory text" because the agencies "cannot simultaneously obey the differing mandates." *NAHB*, 127 S. Ct. at 2554. Thus, as in *NAHB*, the agencies' resolution of this purported conflict, which "harmonizes the statutes," *id.* at 2534, is entitled to deference. That "resolution exemplifies the substantive choices that agencies are expected to make when Congress leaves the intersection of competing objectives both imprecisely marked but subject to * * * administrative leeway." *Chevron U.S.A. Inc.* v. *Echazabal*, 536 U.S. 73, 85 (2002).

2. The agencies' interpretation is also reasonable given the inherent differences between fill material regulated by the Corps through the Section 404 program and the kinds of pollutants regulated by EPA through the NPDES program. Unlike discharges that are covered by Section 402, filling involves alteration of the water body itself in the course of necessary economic activity. Discharges that fill a waterbody with stationary material present different regulatory concerns from discharges of mobile pollutants likely to find their way downstream, and it is reasonable for the agencies to treat these discharges differently.

As the agencies stated when they proposed the latest iteration of the Section 404(b)(1) Guidelines:

> Fill material differs fundamentally from the types of pollutants covered by section 402 because the principal environmental concern is the loss of a portion of the water body itself. For this reason,

> the section 404 permitting process focuses on different considerations than the section 402 permitting program.

65 Fed. Reg. 21,293 (2000).

In connection with the proposed Fill Rule, the agencies further noted that "in assigning a discharge to section 404 versus section 402 permitting, it is important to apply the regulatory regime that is in fact best-equipped to consider and control the impacts of the potential discharge." JA37a-38a. The primary effect of fill material is to "displace or change the elevation of receiving water—often replacing it with dry land." JA47a. Thus, the agencies set the division between them based on the effects of fill material to "ensure that discharges with similar environmental effects will be treated in a similar manner under the regulatory program." 67 Fed. Reg. 31,133.

Because of the different policy considerations applicable to fill material, Section 404 permitting is in many respects *more* rigorous than NPDES permitting. For example, unlike Section 402, Section 404 requires consideration of alternatives to the proposed discharge. Section 404 requires criteria comparable to those governing ocean discharges under Section 403, *see* 33 U.S.C. § 1344(b)(1), and Section 403 expressly requires consideration of "other possible locations and methods of disposal or recycling of pollutants including land-based alternatives." 33 U.S.C. § 1343(c)(1)(F). *See also* 40 C.F.R. § 230.5(c). Thus, while the Section 404(b)(1) Guidelines include water quality criteria, they also "go beyond such a water quality based approach to require numerous additional considerations before a section 404 permit may be issued." 65 Fed. Reg. 21,293. In this case,

the Corps examined 20 different factors in making its Section 404 determination. JA343a.

Far from being unreasonable, the basis for the agencies' differential treatment of fill material was expressly recognized in *Rapanos*:

> In contrast to the pollutants normally covered by the permitting requirement of [Section 402(a)], "dredged or fill material," which is typically deposited for the sole purpose of staying put, does not normally wash downstream * * *. *The Act recognizes this distinction by providing a separate permitting program for such discharges in [Section 404(a)].*

Rapanos, 547 U.S. at 744-45 (plurality).

As noted in *Rapanos*, this dichotomy is part of the basic structure of the CWA. "[F]rom the time of the CWA's enactment, lower courts have held that the discharge into intermittent channels of any pollutant that naturally washes downstream" is generally prohibited by Section 301 without a Section 402 permit from EPA. *Id.* at 743 (emphasis removed). Thus, "the deposit of *mobile* pollutants into upstream ephemeral channels is naturally described as an 'addition * * * to navigable waters'"—the definition of a discharge of pollutants subject to permitting under Section 402—"while the deposit of *stationary* fill material generally is not." *Id.* at 745 n.11 (quoting 33 U.S.C. § 1362(12)) (emphases in original).

Given these recognized distinctions, the agencies' determination that permitting fill material does not mandate strict application of EPA effluent limitations is eminently reasonable. Under the Ninth Circuit's interpretation, fill material would be regulated under Section 402 whenever it comes from a regulated point source, JA531a, thereby requiring

the agencies to categorize discharges between Section 404 and 402 based on where they come from, not what effect they have on the environment.

For example, a discharge of fill materials of the same mineral and chemical composition as the tailings at issue here could be permitted under Section 404 as long as the fill did not come from a mine or other regulated point source. The impact on the waterbody would be exactly the same, yet the discharge would be entirely prohibited in one situation and permitted in the other. Similarly, the Ninth Circuit's approach would allow the Corps to authorize Coeur to fill the entirety of Lower Slate Lake (or an equivalent surface water) with material not subject to EPA limitations, and then pile the tailings on the resulting dry land. Yet that interpretation does not allow the less intrusive action of partly filling the lake with the tailings. The Ninth Circuit's permitting scheme defies common sense. *Cf. Standard Oil*, 384 U.S. at 226 (distinguishing between pollutants based on the source and intent of the discharge under previous water quality statute was "a narrow, cramped reading * * * in partial defeat of its purpose").

By contrast, under the agencies' and the State's approach, fill material is treated as such regardless of where it comes from. Mining by-products, such as tailings, "may have a slightly different physical form from the traditional rock and soil used as fill material, but [they] can have the same effect on the aquatic environment as those materials." JA93a. The Corps could thus conclude that using the tailings as fill in the lake is preferable to filling an even larger area of wetlands and then dumping the

tailings on top to create an unsightly 100-foot-high pile that would be highly visible to passing ships.

EPA's effluent limitations are also inherently ill-suited to the balancing of interests that Congress mandated with regard to fill material. *See* 33 U.S.C. § 1344(b)(1) (requiring consideration of criteria set out in 33 U.S.C. § 1343(c) that include "economic values" and "alternate uses" such as "mineral exploitation"). For example, EPA effluent limitations restrict "total suspended solids" (TSS) to no more than 30 milligrams per liter—*i.e.*, 30 parts per million—for this kind of mine. *See* 40 C.F.R. § 440.104. Fill material, by contrast, is largely solid. *See, e.g.*, JA482a; ER290, 302 (tailings slurry is 55% solid by weight). It makes sense to apply such effluent limitations when the primary concern is the quality of the water with which mobile, suspended pollutants are to be mixed. But it is entirely reasonable to adopt a different approach when stationary fill material will displace the water.

The reasonableness of this approach is further shown by the agencies' determination that discharges *from* the tailings impoundment into downstream waters require a Section 402 permit. The Section 404 permit contains requirements to keep the tailings as fill material and prevent them from re-suspending. JA275a-76a. But even though fill material typically stays put, it sometimes produces alluvium or silt that "makes its way downstream." *Rapanos*, 547 U.S. at 806 (Stevens, J., dissenting). In the event that water from the tailings impoundment is released past the dam, EPA's Section 402 permit imposes stringent limitations and treatment requirements to ensure that mobile pollutants do not make their way downstream.

In *United States* v. *Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985), the Court deferred to the Corps' interpretation of its Section 404 jurisdiction, holding that "we cannot say that the Corps' conclusion * * * —based as it is on the Corps' and EPA's technical expertise—is unreasonable." *Id.* at 134.[10] The same result should obtain here. Assuming *arguendo* that the Ninth Circuit was correct to ignore Section 402's explicit mandate—which one must do even to reach this issue—Congress did not address the dividing line between Sections 402 and 404 and left that determination to the expert agencies. As in *Riverside Bayview*, the agencies' resolution was based on their respective technical expertise and is reasonable. Their interpretation, supported by the State, recognizes the distinctive characteristics of fill material, but also ensures that fill discharges are subject to rigorous environmental review in the form of the Section 404(b)(1) Guidelines and EPA's veto right.

III. THE AGENCIES' INTERPRETATION OF THEIR OWN REGULATIONS IS NOT PLAINLY ERRONEOUS.

The Ninth Circuit erred still further by holding that the agencies incorrectly interpreted their *own* regulations as subjecting discharges of fill material to permitting under Section 404 rather than

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[10] The Court has found that the Corps exceeded its Section 404 authority only where—unlike here—the agency "invoke[d] the outer limits of Congress' power" under the Commerce Clause. *Solid Waste Agency of N. Cook County* v. *U.S. Army Corps of Engineers*, 531 U.S. 159, 172 (2001) ("*SWANCC*"); *see also Rapanos*, 547 U.S. at 724. In those circumstances, the Court has required "a clear indication that Congress intended that result." *SWANCC*, 531 U.S. at 172.

Section 402. "An agency's interpretation of the meaning of its own regulations is entitled to deference 'unless plainly erroneous or inconsistent with the regulation.'" *NAHB*, 127 S. Ct. at 2537-38 (quoting *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997)). Such deference is "all the more warranted" in a case like this, where "the regulation concerns 'a complex and highly technical regulatory program.'" *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994) (citation omitted). Deference is accorded even where "the structure of the regulations is less than clear," *Federal Express Corp.* v. *Holowecki*, 128 S. Ct. 1147, 1155 (2008), and even where an agency's considered interpretation appears in a legal brief, *Auer*, 519 U.S. at 462. Under these standards, the agencies did not err in interpreting and applying their own regulations to allow the permit.

According to the Ninth Circuit, "unequivocal statements" by EPA and the Corps demonstrate that "both agencies intended for effluent limitations and performance standards to apply even to discharges that facially meet the definition of the term 'fill material.'" JA538a, 547a. In fact, the regulations unequivocally provide otherwise:

- For more than 30 years, EPA regulations have provided that discharges of fill material, without exception, "do not require NPDES permits." 40 C.F.R. § 122.3(b).
- The 2002 Fill Rule provides that any discharge of fill material will be subject to the Corps' jurisdiction under Section 404, and specifically provides that "discharge of fill material" includes the "placement of overburden, slurry, or tailings, or similar mining-related materials." 33 C.F.R. § 323.2(f).

- The Section 404(b)(1) Guidelines have never required application of EPA effluent limitations.

Because the plain language of the regulations is dispositive, there is no need to look further. But to the extent that there is any ambiguity as to whether the regulations subject the fill material at issue to the Corps' exclusive jurisdiction, the agencies dispelled that in 2002 by confirming unambiguously that "EPA has *never* sought to regulate fill material under effluent guidelines." 67 Fed. Reg. 31,135 (emphasis added). *See also id.* at 31,133 (the Fill Rule "determines the basic jurisdiction of the section 404 versus the section 402 program"). And if that statement were not clear enough, they also made clear that "*any* mining-related material that has the effect of fill when discharged will be regulated as 'fill material,'" and that "the section 404 program is the most appropriate vehicle for regulating overburden and other mining-related materials." *Id.* (emphasis added). As the agencies explained, tailings "both have the effect of fill and are geological materials similar to many other types of fill material; we thus agree it is appropriate that they be regulated under section 404." JA44a.

Moreover, the agencies specifically changed language in the Fill Rule to preclude the very interpretation adopted by the Ninth Circuit. Faced with the possibility that "discharges [would be] excluded from section 404 coverage simply due to the presence of constituents in the material for which effluent limitation guidelines exist," the agencies eliminated a proposed provision stating that discharges covered by a Section 402 permit would not require a Section 404 permit. SER1018.

Although the Ninth Circuit strangely found that the agencies' removal of this language showed their intent to keep it, JA544a-45a, just the opposite is true.

The other materials relied on by the Ninth Circuit do not evince a contrary view of the statute, much less plain error in the agencies' interpretation of their regulations. The court relied on the agencies' statements, in promulgating the Fill Rule, that:

- the rule would not "change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402";
- "[i]f a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, and vice versa";
- "if EPA has previously determined that certain materials are subject to an [effluent limitation guideline] under specific circumstances, then that determination remains valid"; and
- "no discharges that were previously prohibited are now authorized as a result of this rulemaking."

JA543a-46a (quoting 67 Fed. Reg. 31,135; JA83a; JA48a; JA32a).

These statements, which are from either the preamble to the Fill Rule or the agencies' responses to comments on the proposed rule, cannot supersede the unambiguous language of the regulations. But regardless, nothing in the statements provides that EPA or the Corps must apply effluent limitations to discharges meeting their current definition of fill

material. As noted, the agencies stated in the very same proceeding that EPA had "never" done so. 67 Fed. Reg. 31,135. Indeed, the statement that "[i]f a specific discharge is regulated under Section 402, it would not also be regulated under Section 404, *and vice versa*," JA83a (emphasis added), confirmed that fill material would *not* be subject to EPA permitting requirements under Section 402.

At most, the statements relied on by the Ninth Circuit stand for the truism that EPA effluent limitations will be applied when they are applicable. For example, EPA has clarified that the mere settling of waterborne pollutants over time would not turn them into fill material. *See* 67 Fed. Reg. 31,135 ("[r]ecognizing that some discharges (such as suspended or settleable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to the settling of waterborne pollutants, we do not consider such pollutants to be 'fill material'"). But none of these statements provides that such limitations would be applied to discharges of fill material.

Even more off-base was the court's reliance on internal memoranda concerning other mine projects. *See* JA539a, 544a. Citing two internal Corps memoranda, the court noted that "[a]fter the adoption of the MOA in 1986, the Corps continually declined to exercise jurisdiction over mine tailings." JA539a. Again, these informal statements cannot override the plain language of the regulations. But these memoranda merely evidence disagreement among some agency personnel as to whether tailings were subject to Corps jurisdiction under the *old* fill definition, which exempted all discharges of "waste." *See* ER173 ("the tailings do not meet the Corps'

definition of fill material"); ER176-177. They nowhere state that EPA would have jurisdiction over discharges that meet the definition of fill material, and presume the opposite. Moreover, these memoranda were authored by subordinate officials who could not and did not speak for the Corps. For example, the latter memorandum merely "requests that the question be referred to the Washington level for resolution." ER178. Corps headquarters, with the concurrence of EPA, responded that "the potential impacts of the discharge of the mine tailings must be considered within the context of the section 404 permit evaluation." SER1062.

The Ninth Circuit's reliance on non-final decisions regarding the Kensington Project, *see* JA547a, was also misplaced. The court cited a 1998 Corps decision noting that "[t]he Corps does not regulate the placement of the tailings." ER257. But that decision referred to the *dry* tailings facility ("DTF"), where the tailings would have been placed on dry land not subject to Corps regulation. *Id.* The court's reliance on EPA's decision regarding its Section 402 permit, JA547a, is equally misleading. That decision referred not to discharges of the tailings themselves but to the discharges *from* the tailings impoundment to downstream waters, JA292a, which all parties agree are subject to EPA jurisdiction.

In any event, earlier agency statements are irrelevant because the Court is "empowered to review only an agency's *final* action." *NAHB*, 127 S. Ct. at 2530. The agencies' final action here was to agree that the discharge at issue was properly permitted under Section 404 as fill material. There was no ambiguity or disagreement about that issue. Applying the current Fill Rule to the Kensington

project, the agencies "agree[d] that * * * the discharge of the mine tailings into the impoundment is subject to permitting under CWA section 404," and that "the regulatory regime applicable to discharges under section 402, including effluent limitations guidelines and standards, such as those applicable to gold ore mining * * * do not apply to the placement of the tailings into the proposed impoundment. JA144a-154a (citing 40 C.F.R. Part 440, Subpart J). That interpretation of the regulations was not plainly erroneous and therefore warrants deference.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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